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No.: ICC-01/05-01/08

Date: 27 July 2016

TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

Public Redacted Document

**Public redacted version of “Prosecution’s Application for an Inquiry and the Issuance of Comprehensive Guidelines under Articles 57(3)(c) and 68 of the Rome Statute, Rules 87 and 88 of the Rules of Procedure and Evidence”,
16 October 2008, ICC-01/05-01/08-162-Conf**

Source: The Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the Regulations
of the Court to:**

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I. Procedural History

1. On 31 August 2008, Judge Hans-Peter Kaul, acting as Single Judge on behalf of the Pre-Trial-Chamber III (the “Chamber”), issued the “First decision on the Prosecutor’s request for redactions”¹ (“First Decision”) and, *inter alia*, requested the Defence to keep the information disclosed confidential and to ensure that it is not passed on to the public.²

2. On 22 September 2008, Judge Fatoumata Dembele Diarra, acting as Single Judge on behalf of the Chamber, rendered a decision entitled “Décision sur la surveillance des communications non-privilegiées de Jean-Pierre Bemba Gombo”³ ordering that the Registry put under surveillance the non-privileged telephone communication of Mr. Bemba and to regularly report to the Chamber and the Prosecutor on any issue related to the protection of witnesses. That same day, the Chamber recalled that the Defence was requested to keep disclosed information confidential and ensure that it is not passed on to the public, unless otherwise ordered.⁴

3. On 22 September 2008, the Prosecution filed on an *ex parte*, under seal basis the “Prosecutor’s Amended Application for Proposed Redactions Pursuant to Rules 81(2) and 81(4)” which requested, *inter alia*, the regulation of witness contact.⁵

¹ ICC-01/05-01/08-85-Conf

² See page 16, letter (c), ICC-01/05-01/08-85-Conf

³ ICC-01/05-01/08-118-Conf

⁴ See “Décision sur la Requête du Procureur du 5 septembre 2008”, paragraph 10, ICC-01/05-01/08-117-Conf

⁵ ICC-01/05-01/08-114-Conf-Exp. While this filing was under seal and *ex parte*, the Prosecution has cited it here because the Chamber has ruled that “the making of such references in the present decision is required by the principle of fairness of proceedings for the defence, and [the Chamber] considers that it is not inconsistent with the nature of the documents referred to”: see paragraph 2, ICC-01/05-01/08-134-Conf and footnotes to this application therein.

4. On 1 October 2008, the Chamber issued its “Decision on the Prosecutor’s request for the regulation of contacts of Jean-Pierre Bemba Gombo” whereby it held that the Prosecutor’s application was not sufficiently substantiated⁶ and found that “preventing the defence team ‘to contact directly or indirectly (...) witnesses except through the Office of the Prosecutor, should the witness consent to such contact’ would be an order violating the basic rights of the defence to examine the witnesses and thus be able to have access to them”.⁷ In that decision, the Chamber recalled its decisions of 31 August 2008 and 22 September 2008⁸ and found, after referring to articles 8(4) and 8(3) of the Code of Professional Conduct for counsel (the “Code”)⁹, that “the defence team composed of professional counsels respecting secrecy and confidentiality is well aware of its obligations”.¹⁰

5. On 1 October 2008, the Office of the Prosecutor (“the Prosecution”) filed, *inter alia*, the Document Containing the Charges and the List of Evidence¹¹.

II. Request for Confidentiality

5. The Prosecution requests that this application be received as “Confidential” because it relates to material that is currently treated as confidential.

⁶ Paragraphs 17, 30 and 32, ICC-01/05-01/08-134-Conf

⁷ Paragraph 29, ICC-01/05-01/08-134-Conf

⁸ Paragraphs 19 and 25, ICC-01/05-01/08-134-Conf

⁹ Paragraphs 20 and 22, ICC-01/05-01/08-134-Conf

¹⁰ Paragraph 20, ICC-01/05-01/08-134-Conf

¹¹ ICC-01/05-01/08-129 and ICC-01/05-01/08-US-Exp-129-Anxs 1.A to 1.D and ICC-01/05-01/08-Conf-Exp-129-Anx 2.A to 2.D respectively.

III. Facts upon which the Submission is Based

6. On 17 September 2008, a staff member of the Office of the Prosecutor explained to [REDACTED] (witness 0037) that his name and statement would be disclosed to the Defence and the Court within the framework of the confirmation of charges.

7. On 5 October 2008, the Prosecution has received information that [REDACTED].

8. [REDACTED]. The witness was advised to report any additional incidents to a designated person in the Office of the Prosecutor.

9. In response to the above situation, Witness 0037 [REDACTED].

10. The Prosecution informed the Victims and Witnesses Unit (“the VWU”) of this incident on 8 October 2008. The VWU indicated that [REDACTED].

IV. Request For An Inquiry and Legal Justification

11. Article 8(1) of the Code requires counsel to “respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court”.

12. Article 8(2) of the Code notes that “[t]he relevant provisions referred to in paragraph 1 of this article include, inter alia, article 64, paragraph 6 (c), article 64, paragraph 7, article 67, paragraph 1 (b), article 68, and article 72 of the

Statute, rules 72, 73 and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court”.

13. Article 8(3) of the Code permits counsel to reveal such protected information only to “co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case”.

14. Further, in addition to the two orders of the Chamber issued on 31 August 2008¹² and 22 September 2008¹³ whereby the Defence was requested to keep information disclosed confidential and to ensure that it is not passed on to the public, Article 8(4) of the Code states that “[s]ubject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of Procedure and Evidence and the Regulations of the Court, or the Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court”.

15. With regard to the need for regulating contacts with witnesses, the Prosecution would like to refer to of the jurisprudence of this Court.¹⁴ In *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I issued a decision based

¹² See page 16, letter (c), ICC-01/05-01/08-85-Conf

¹³ See paragraph 10, ICC-01/05-01/08-117-Conf

¹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, “Framework concerning Protective Measures for Prosecution and Defence Witnesses”, ICC-01/04-01/06-447. Reference may also be made to the subsequent Trial Chamber’s “Decision on the prosecution’s application for an order governing disclosure of non-public information to members of the public and an order regulating conduct with witnesses”, ICC-01/04-01/06-1372 to similar effect.

on the consent of the witness which regulated contact between a party and the witnesses of an opposing party.

V. Relief Sought

16. The Prosecution respectfully requests that the Chamber considers opening an inquiry into the circumstances of the release of the said information related to witness 0037.



Fatou Bensouda, Prosecutor

Dated this 27th Day of July 2016
At The Hague, The Netherlands